No. 28.

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APRIL, TERM, 1892.

WM. H. LAKIN, PLAINTIFF IN ERROR,

vs.

J. H. ROBERTS, W. C. ROBERTS, M. KERR AND MRS. KERR, HIS WIFE, P. LAURENZI, JOHN DALY, P. TIVENON, M. ANTONOVICH, J. F. BACHER, JOHN WILLOUGHBY, JOHN NEVILL, JOHN KNIGHT, A. CURTIS, D. ROBINSON, H. B. HOUGHTON, J. F. HOUGHTON, JOHN THOMAS, JAS. MENZIES, GEO. WOODWARD, MRS. ANNA JENKINS, O. B. DOLLY AND MRS. DOLLY, HIS WIFE, M. A. PASSETTA, B. L. JONES, M. WILLOUGHBY, W. H. THOMAS, JOHN POWNING, SOL. BABB, MRS. BABB, HIS WIFE, GEO. HAKE, G. E. COOK, FRANK MEFFLEY, GEO. MAXWELL, ROBT. PENMAN, L. CIPRIOTTO, FRANK TUCKER, H. S. DUNN, WM. LITTECOTT, JOHN CREIGHTON, F. VANZINI, EDWARD MITCHELL, WM. GALLAGHER, A. GRAZIER, H. PERIN, M. CURTIS, E. STEPHENS, JACK MONI, HENRY DONEY, AND L. GRONDONI, DEFENDANTS IN ERROR.

TRANSCRIPT ON WRIT OF ERROR.

TO THE U. S. CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WM. H. LAKIN, PLAINTIFF IN ERROR,

vs.

J. H. ROBERTS ET AL., DEFENDANTS IN ERROR.

TRANSCRIPT ON WRIT OF ERROR.

TO THE U. S. CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

1 In the Circuit Court of the United States, Ninth Circuit,

Northern District of California.

Wm. H. Lakin, Plaintiff,

vs.

J. H. Roberts, W. C. Roberts, M. Kerr and Mrs. Kerr, his wife, P. Laurenzi, John Daly, P. Tivenon, M. Antunovich, J. F. Bacher. Jno. Willoughby, Jno. Nevill, Jno. Knight, A. Curtis, D. Robinson, S. Soracco, R. Tramaloni, H. B. Houghton, J. F. Houghton, Jno. Thomas, Jas. Menzies, Geo. Woodward, Mrs. Anna Jenkins, O. B. Dolly and Mrs. Dolly, his wife, M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, Jno. Powning, A. Travega, Sol. Babb and Mrs. Babb, his wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henry Doney. Frank Tucker, H. S. Dunn, Wm. Littecott, Jno. Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perin, M. Curtis, E. Stephens, Jack Monie, A. Daly, Ira Dearburn, Jos. Ingram, S. Trengove, H. Pascoe, Jos. Tippett, A. Pickens. Rich'd Kemp, L. Grondoni, A. Pezzola, John Wegan, F. Sobrero, B. Ferngaro, Jos. Giambrone, Carlo Paggi, Baptisto Ledonesis, John Daly, A. Pascu, C. Carlo, John Sorocco, Jno. Grondoni, Peter Cunio, Louis Pezzalo, Berto Salari, Jno. Cunio, Nicholas Salari, John Doe, Richard Roe, John Denn, Richard Denn, John Fenn and Richard Fenn, Defendants.

The plaintiff, Wm. H. Lakin, who is a citizen of the State of Ohio, and a resident of Clermont County, in said State, complains of the defendants above named, all of whom
2 are citizens of the State of California, and residents of the County of Plumas, in said State, and for cause of action alleges:

1st. That plaintiff is, and since the 19th day of November, 1888, has been the owner, seized in fee, and entitled to the possession of the following described premises situated in the County of Plumas, and State of California, to-wit:

Beginning at a point N. 45 deg. 30 min. E. 2100 ft. distant from an iron pin set in a rock near the mouth of the "railroad" tunnel, Plumas Eureka Mine, said iron pin being the initial

point of the patent survey of the Eureka Quartz Mine (from which pin a hole drilled in a large rock bears N. 54 1-2 deg. E. 151. 8 ft. distant) (from said point of beginning an iron pin set in a large green stone rock bears N. 38 1-4 deg. W. 96.40 ft. distant) and running thence (1st) S. 44 1-2 deg. E. 1192.5 ft. to a post in rock mound from which an iron pin set in the top of a large green stone rock bears N. 87 1-2 deg. E. 80.5 ft. distant and post M. No. 2 of the Mammoth patented land bears S. 76 1-4 deg. W. 185.44 ft distant; thence (2nd) N. 76 1-4 deg. E. 1769 ft. to the northerly corner of Plumas Eureka Company's pressure box or tank on tail ditch from the "Mohawk" mill, from which post M. No. 3 of the Mammoth patented lands bears S. 36 1-2 deg. W. 156.5 ft. distant; thence (3rd) N. 87 deg. 47 min. E. 740 ft. to a post in rock mound 75 ft. northerly from the Plumas Eureka Company's Sulphuret works, 856 ft. to center of Jamison Creek; thence up the center of Jamison Creek as follows: (4th) S. 30 deg. E. 290 ft. (5th) S. 64 1-2 deg. W. 300 ft. (6th) S. 42 1-2 deg. W. 220 ft. (7th) S. 15 deg. W. 340 ft; thence across island. (8th) S. 55 deg. W. 480 ft. to intersection with the third course of the said Mam-
3 moth patented lands; thence on said third course. (9th) S. 9 deg. 57 min. E. 270 ft. to an iron pin set in a ledge of Hornblendic greenstone described in said Mammoth patent as an "iron pin set in a Basalt rock;" thence (10th) S. 64 deg. 53 min. W. 200 ft. to center of Jamison Creek; thence up the center of Jamison Creek (11th) S. 7 deg. E. 335 ft. to its intersection with the fifth course of the Mammoth patented lands; thence (12th) S. 80 deg. 45 min. E. 854 ft. to corner M. No. 5 of said Mammoth patented land, from which a cedar tree 24 inches in diameter bears S. 83 1-2 deg. E. 16 ft. distant, a cedar tree 24 inches in diameter bears S. 2 1-4 deg. E. 24.75 ft distant and a pitch pine 24 inches in diameter bears N. 83 1-2 deg. W. 64.5 ft. distant; thence (13th) N. 30 deg. 20 min. E. 4355 ft. to a pine stump 5 ft. in diameter M. No. 6 of said Mammoth patented lands; thence (14th) S. 88 deg. 20 min. W. crossing Jamison Creek 1395 ft. to post M. No. 7 of said Mammoth patented lands from which a pine tree 18 inches in diameter bears S. 46 1-2 deg. W. 23.3 ft. distant, the N. E. corner of the graveyard fence bears S. 53 deg. W. 29.70 ft distant, and the 1-4 section corner on South boundary of Sec. 12, T. 22 N., R. 11 E, Mt. Diablo Base and Meridian, bears N. 71 deg. 53 min. W. 320 ft. distant; thence

(15th) S. 69 deg. W. 2450 feet to post M. No. 8 of said Mammoth patented lands; thence (16th) N. 45 deg. 11 min. W. 842 ft. to corner M. No. 9 of said Mammoth patented lands from which a sugar pine stump 5 feet in diameter bears S. 46 1-2 deg. E. 30 ft. distant; thence (17th) N. 45 1-2 deg. E. 594 ft. to corner M. No. 10 of said Mammoth patented lands from which a pitch pine tree 36 inches in diameter bears N. 85 deg. 42 min. E. 168 ft. distant; thence (18th) N. 44 deg. 30 min. W. 214 ft. to a post in rock mound M. No. 11 of said Mammoth patented lands, from which the S. W. corner of Sec. 12, T. 22 N., R. 11 E., Mt. Diablo Base
4 and Meridian bears S. 55 1-2 deg. W. 438.6 ft. distant; thence (19th) S. 45 deg. 30 min. W. 2288 ft. to a post in rock mound from which an iron pin set in a large green stone rock bears N. 31 1-2 deg. W. 47 ft. distant; thence (20th) S. 44 deg. 30 min. E. 50 ft. to the place of beginning.

2nd. That the defendants, and each of them, wholly disregarding the rights of said plaintiff, heretofore, to-wit: on the 19th day of November, 1888, wrongfully and unlawfully entered upon the said tract of land belonging to this plaintiff, and wrongfully and unlawfully ousted this plaintiff therefrom, and wrongfully and unlawfully withhold the possession thereof from this plaintiff.

3rd. That the plaintiff is ignorant of the true names of the defendants John Doe, Richard Doe, John Denn, Richard Denn, John Fenn and Richard Fenn, and therefore sues them by said fictitious names and plaintiff prays that when their true names are discovered this complaint may be amended by inserting the same.

4th. That the value of the premises so withheld by defendants from plaintiff, and in controversy in this action, exceeds the sum of five thousand dollars.

Wherefore plaintiff prays judgment that he recover the possession of said premises from the said defendants, and each of them, and have a writ of restitution therefor; and that he recover his costs herein expended.

5 Duly verified.

H. L. GEAR,

Attorney for Plaintiff.

Endorsed: Filed December 5th, 1889. L. S. B. Sawyer, clerk.

(Here follows pages 6 to 21 inclusive in original record which contain the summons and return of service which are omitted from the printed transcript pursuant to stipulation.)

Answer.

22 (Title of court and cause.)

Now come J. H. Roberts, W. C. Roberts, M. Kerr and Mrs. Kerr, his wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Bacher, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, S. Sorocco, H. B. Houghton, J. F. Houghton, John Thomas, Jas. Menzies, Geo. Woodwood, Mrs. Anna Jenkins, O. B. Dolly and Mrs. Dolly, his wife, M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol Babb and Mrs. Babb, his wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henery Doney, Frank Tucker,
23 H. S. Dunn, Wm. Littecott, John Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perrin, M. Curtis, E. Stephens, Jack Moni, A. Daly, Ira Dearburn, Jas. Ingram, H. Pasco, Jas. Tippett, A. Pickens, Richard Kemp, Z. Grondoni and John Wegan, some of the defendants, and answering for themselves alone, deny:

1st. That plaintiff owns, or ever owned, or was ever seized of, or is, or ever was, entitled to the possession of the land described in the complaint, or any portion thereof.

2nd. That these defendants, or either or any of them, ever wrongfully or unlawfully entered upon said tract or ousted the plaintiff therefrom, or from any portion therefrom, or that they or either of them ever withheld the same or any portion of said land from plaintiff, save and except a small portion thereof occupied and described as the town of Johnsville, which town is particularly marked and designated by survey and plat on file with the Recorder of Plumas county as the Official Plat of said town, and except also, three certain lots on what is called Eureka Hill, west of said town, hereinafter more particularly described, all of which said excepted portions comprise about twenty-one acres of land and which are held by the defendants severally, each holding a separate and distinct lot or portion thereof, as hereinafter more particularly described.

Further answering defendants allege:

1st. That the town of Johnsville is situated on said tract of land; that it is a place of business and trade with a population of more than two hundred people, and having public buildings and a cemetery, and has been such for more
24 than thirteen years last past; that the said town occupies about twenty acres of land and is laid off in streets, blocks and lots, and has been regularly surveyed, and an official plat of said survey is on file with the Recorder of Plumas county, California, showing the said streets, blocks and lots, and the extent and location of the same.

2nd. That most all of these defendants are residents of said town, and they and their several grantors have been such residents during the existence of said town, and they severally are, and for more than six years last past, they and their several grantors have been in the open, notorious, peaceable and exclusive possession and occupancy of certain lots, pieces and parcels of said town-site lands, that is to say: The defendant J. H. Roberts and his grantors of Lot two in Block nine; defendant W. C. Roberts and his grantors of Lot three in Block nine; defendant Kerr and his wife and their grantors of Lot four in Block nine; defendant Laurenzi and his grantors of Lot two in Block four and Lot five in Block nine; defendant John Daly and his grantors of Lot eight in Block nine; defendant Antonovich and his grantors of Lot one in Block ten; defendants Willoughby and their grantors of Lot five in Block five, Lot three in Block ten, and Lot three in Block fourteen; defendant Nevill and his grantors of Lot one in Block two, Lot three in Block seven, Lot two in Block ten, Lots one and two in Block eleven and Lot one in Block twelve; defendant Curtis and his grantors of Lot two in Block twelve; defendant Robinson and his grantors of Lot three in Block eleven; defendant Houghton and his grantors of Lot one in Block one, and Lot four in Block twelve;
25 defendant John Thomas and his grantors of Lot one in Block eight; defendant Menzies and his grantors of Lot two in Block eight; defendant Woodward and his grantors of Lot two in Block seven; defendant Jenkins and his grantors of Lot one in Block seven; defendant Passetta and his grantors of Lot one in Block five, and Lot one in Block six; defendant Jones and his grantors of Lot one in Block four, and Lot three in Block six; defendant W. H. Thomas and his grantors of Lot three in Block four; defend-

ant Paesega and his grantors of Lot five in Block four; defendants Babb and their grantors of Lot two in Block one; defendant Hicks and his grantors of Lot three in Block one; defendant Cook and his grantors of Lot five in Block one; defendant Meffley and his grantors of Lot three in Block two; defendant Maxwell and his grantors of Lot four in Block two; defendant Cipriotto and his grantors of Lot four in Block three; defendant Doney and his grantors of Lot two in Block three; defendant Penman and his grantors of Lot five in Block two; defendant Tucker and his grantors of Lot one in Block three; defendant Dunn and his grantors of Lot two in Block two, and Lot three in Block three; defendant Liddcott and his grantors of Lot two in Block fourteen; defendant Creighton and his grantors of Lot four in Block fourteen; defendant Vanzini and his grantors of Lot one and two in Block eleven, Lot five in Block fourteen, and Lot one in Block twelve; and defendant Grazier and his grantors of Lots six and seven in Block nine, and Lot one in Block fourteen; as each and all of the aforesaid lots are described on the aforesaid official plat of said town. And during all of said time each of these defendants and their respective grantors have claimed title to the Lot so held by him and them respectively
26 adverse to all persons and particularly adverse to the plaintiff. And that such possession and occupancy was with the knowledge of plaintiff.

3rd. That the defendants Dearburn, Ingram and Pascoe now are, and for more than six years prior to the commencement of this action, they and their grantors have been severally in the open, notorious, quiet and peacable possession and occupancy of three certain lots of land on Eureka Hill, immediately west of said town of Johnsville, and within the general tract described in plaintiff's complaint that is to say: The defendant Dearburn and his grantors of that certain lot known as and called the Dearburn dwelling house, lot about fifty feet square; the defendant Ingram and his grantors of that certain other lot generally known and called as the Ingram dwelling house, lot about fifty feet square; and the defendant Pascoe and his grantors of that certain other lot of land generally known as and called the Pasco dwelling house, lot about fifty feet square, each of them and their several grantors claiming title thereto during all of said time, adverse to all persons and particularly adverse to the plaintiff, and their said several possession and occupancy of said premises was with the knowledge of plaintiff.

4th. The defendants further allege that neither the plaintiff, his ancestor, predecessor nor grantor has been seized or possessed of either or any of the said lots in the town of Johnsville or on said Eureka Hill, or of any part or portion of either of the same within six years last past.

Wherefore defendants ask that this action as to them
27 and to each of them be dismissed, and that they have judgment for their costs and disbursements in this behalf expended.

GOODWIN & GOODWIN,

Attorneys for Defendants named.

Duly verified.

Endorsed: Service of the within answer is hereby admitted this 20th day of March, 1890.

H. L. GEAR,

Attorney for Plaintiff.

Filed March 20, 1890. L. S. B. Sawyer, clerk.

Findings.

28 (Title of court and cause.)

This cause was submitted to the court upon documentary and other evidence stipulated between the plaintiff and such of the defendants as are represented by attorneys Goodwin & Goodwin; and the court having fully considered the same finds there from the following facts:—

1. That the lands described in the complaint are mineral lands, situated within the Jamison Quartz Mining District in Plumas County, State of California, and embrace the lands upon which the town of Johnsville is situated; that said lands have never been sectionized by the Government of the United States, nor in any manner surveyed by the Government other than as surveyed in the proceedings to obtain the patent hereinafter mentioned under which plaintiff claims title.

2. That said patent was issued to the Mammoth Gold Mining Company, a domestic corporation, on the 18th day of May 1877, and purports upon its face to be issued in pursuance of the Revised Statutes of the United States, upon an entry made by the said Mammoth Company, March 17th,

1877, but was in fact issued upon an application made by one John B. McGee and one James M. Thompson on
29 August 30th 1867, under the law of Congress entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26th, 1866; that the patent embraces 4,100 ft. of a gold bearing quartz lode with 252.95 acres of surface ground; that the length along the lode embraces two locations, one the original Mammoth located in 1851, being 2100 feet, and the other the Extension, located in 1865, being 2000 feet in length, and in making said location no surface ground was claimed along the line of said lode; that the actual trend of the lode upon the said Extension is, and at the time of its location and at the time the patent issued was unknown, but the lode line as located in the original Mammoth and the Extension, and as marked upon the surface of the ground, and as fixed in the patent, is a straight line along the west or north west boundary of said patented tract and within fifty feet of said boundary line; and that the surface tract covered by the patent, except said fifty feet, is on the east or south-east side of said lode and extends about three-fourths of a mile therefrom.

3. That in 1851 the miners of said district adopted written laws governing the location of quartz claims therein, but such laws made no provision for the location of surface ground in connection with quartz claims in excess of one hundred feet on each side of the lode; nor was there at any time prior to 1868 any law, usage or custom in force in said district authorizing the location or occupancy of more than one hundred feet of surface ground on each side of the lode located; that the quartz miners of said Jamison District who opened and worked mines on Eureka Mountain therein, actually
30 occupied such portion of the public land as they chose for the purpose of working their mines, the extent of such occupation however was not a matter of defined custom, but of actual possession; but there was no actual possession for mining purposes of the land on which the town of Johnsville is situated except the road leading across the same from the Mammoth mine to the Mammoth mill and to Jamison city; that it was the custom in force in said district from 1856 to 1868 to record all notices of mining locations in the office of the County Recorder of Plumas County, but no notice of the location or claim of the surface ground described in

said patent was ever so recorded until the patent was placed of record, and then only as contained therein.

4. That in 1867 said McGee and Thompson, then claiming to own both the Mammoth and the Extension, caused to be made a survey and diagram of the lode and exterior boundaries of the surface ground, and on the 30th day of August, 1867 they posted on said Mammoth claim the diagram and a notice as follows: "The undersigned give "notice that they intend to apply for a patent for the vein or "lode set forth in the above diagram called the Mammoth "quartz claim, situated in the Jamison Mining District, "County of Plumas, California, and now post this notice on a "conspicuous part thereof. Dated on the ground this 30th "day of August, 1867.

" JOHN B. McGEE,

" JAMES M. THOMPSON."

That on the 7th day of September, 1867 they caused to be published in the Plumas *National*, a newspaper published in said County nearest said claim the following notice:

"The undersigned give notice that they intend to apply for
"a patent for the vein or lode known as the Mammoth
31 "quartz claim situated in the Jamison Mining District,
"County of Plumas, State of California, and now post
"this notice on a conspicuous part thereof; commencing at an
"iron pin drilled into a rock on the line dividing the Mam-
"moth claim from the Eureka Claim and running thence for
"the center of the vein northeast 4,100 feet, and including
"the land between the lode and Jamison creek for working
"purposes. Dated on the ground this 30th day of August,
"1867.

" JOHN B. McGEE,

" JAMES M. THOMPSON."

That no notice than the one first above described was ever posted, and none published other than the one last described, in the proceedings to obtain said patent; that on the 11th day of Sept. 1867 said McGee and Thompson made and caused to be filed in the United States Land Office at Marysville, California, the office for the District in which said mine was situated, an application to purchase said quartz claim under the act of Congress aforesaid; and accompanied said application with the notice and diagram first above set forth;

that they caused the notice last above described to be published in the paper as aforesaid for the period of ninety days continuously from the said 7th day of Sept. 1867; and that they took no other or further steps to procure a patent for said claim; that subsequently their right to the 2,100 feet of the Mammoth claim, with all tunnels, mills and other mining appliances appurtenant thereto passed to the said Mammoth Gold Mining Company; that in March 1877 the said procured of the United States Surveyor General for California an adoption of the field notes of the survey which said McGee and Thompson had made in 1867 as aforesaid, as and for a final United States survey of the whole tract described in the patent, and took such other steps in the premises, without further notice or publication, as pro-
32 cured the issuance of the patent therefor on the 18th day of May 1877 as heretofore found; that by mesne conveyances the rights of said Company passed to the Sierra Buttes Gold Mining Company; that the rights of said McGee and Thompson in and to the Extension to the Mammoth claim having passed to the plaintiff he commenced an action in this court against the said Sierra Buttes Gold Mining Company to enforce a trust against said Company in his favor as to said Extension, and thereafter, to wit: On the 19th day of November 1888 he obtained judgment in said action whereby and in pursuance of which there was conveyed to said Wm. H. Lakin, as part and parcel of said patented premises, the tract of land described in the complaint in this action.

5. That on the 17th day of June 1876 one John F. Banks entered upon and claimed twenty acres of land upon which the town of Johnsville is now situated and located the same for building and agricultural purposes; that notice of his claim thereto was recorded upon the records of Plumas County prior to the issuance of said patent; that buildings were erected on portions of his said tract during the summer and fall of that year; that the claim of Banks to this tract of land became vested in some of these defendants residing in said town; that by 1880 said town became and has since remained the center of trade and business for that section of country; that during all of said time the said town was laid off into streets, blocks and lots and had a population of over two hundred persons; and that no portion of said town is within one thousand feet of the lode as located and described in the patent.

6. That in 1883, for the first time, the said Sierra Buttes Gold Mining Company demanded of the citizens of Johnsville that they should pay a nominal rent to the Company for the land occupied by them as town lots; that the defendant
33 Dolly and several other defendants paid from one to five dollars each at that time; that at no time prior to said date did any other person or company claiming to own the said land under said patent demand any rent of the citizens of said town, nor was any rents thereafter demanded until by this plaintiff in the spring of 1889; that those of defendants, if any, who entered upon the land subsequent to 1883, either obtained permission of said Sierra Buttes Company or entered upon the land within the limits of said town with the understanding that the said Company did not object to their occupancy so long as the enjoyment of its rights in the premises were not interfered with.

7. That the lands embraced in the patent were assessed for State and County purposes from 1878 to 1888, to the mining Company and it paid the taxes thereon; that after 1883 the defendants were assessed for taxes on their respective improvements on the land occupied by them, and the taxes so assessed were paid by them.

8. That in the spring of 1889 the plaintiff notified the defendants represented herein by attorneys Goodwin & Goodwin, to wit: Defendants J. H. and W. C. Roberts, M. Kerr and wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Bacher, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, H. B. Houghton, J. F. Houghton, John Thomas, Jas. Menzies, George Woodward, Mrs. Anna Jenkins, O. B. Dolly and wife, M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol Babb and wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henry Doney, Frank Tucker, H. S. Dunn, William Littecott, John Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perin, M. Curtis, E. Stephens and J. Moni, that they must either pay rent for the land occupied by them, purchase said land, or quit the premises and move their improvements therefrom, within thirty days from such notice; that said de-
fendants neglected and refused to perform either of
34 said requirements and remained in possession of their several lots of land within said tract.

As conclusions of law from the foregoing facts the Court finds:

1st. That as to the land occupied by said defendants the said patent is void.

2nd. That at the time that this action was commenced the plaintiff did not own nor was he entitled to the possession of the land occupied by the defendants.

3rd. That as to the defendants herein above named this action be dismissed; and

4th. That they have judgment against the plaintiff for their costs and disbursements herein.

HAWLEY, *Judge.*

Endorsed: Filed October 31, 1891.
L. S. B. Sawyer, Clerk.

Judgment.

35 (Title of court and cause.)

This cause having been submitted to the Court, and the Court having filed its Findings of Fact and Conclusions of Law herein:

Now, in accordance therewith, it is by the Court ordered, adjudged and decreed that as to the defendants, J. H. & W. C. Roberts, M. Kerr and wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Barker, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, H. B. Houghton, J. F. Houghton, John Thomas, James Menzies, Geo. Woodward, Mrs. Anna Jenkins, O. B. Dolly and wife, M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol Babb and wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henry Doney, Frank Tucker, H. S. Dunn, William Littecott, John Creighton, F. Vanzini, Edward Mitchell, William Gallagher, A. Grazier, H. Perin, M. Curtis, E. Stephens, J. Moni, L. Grondoni, the said action be dismissed and that they do have and recover of the plaintiff their costs and disbursements necessarily disbursed herein, taxed at — dollars.

Judgment entered this 31st day of October, 1891.
L. S. B. Sawyer, clerk.

[SEAL.]

A true copy. Attest.

L. S. B. SAWYER, *Clerk.*

Endorsed: Filed October 31, 1891.

L. S. B. Sawyer, clerk.

[Here follows pages 36 to 41 inclusive in original record containing additional findings and judgment on additional findings in favor of plaintiff against other parties, not parties to this writ of error, and which are omitted from this printed record pursuant to stipulation.]

Certificate to Judgment-Roll.

42 (Title of court and cause.)

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above entitled action.

Attest my hand and the seal of said Circuit Court this 31st day of October, 1891.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Judgment-roll filed October 31, 1891.

L. S. B. Sawyer, clerk.

Bill of Exceptions.

43 (Title of court and cause.)

Be it remembered that the above entitled cause was submitted to the Court upon facts, exhibits, documentary and other evidence stipulated between plaintiff and the defendants, represented by Messrs. Goodwin & Goodwin, pursuant to the following stipulation which was filed in said cause on the 28th day of April, 1890.

(Title of court and cause.)

"It is stipulated that the controversy between plaintiff and "defendants, represented by Goodwin & Goodwin, be sub- "mitted for decision as far as respects said defendants and

"each of them upon the following agreed statement of facts:
"It is agreed that plaintiff holds whatever title to the "premises in controversy was acquired by the patent of the "United States to the Mammoth Gold Mining Company, a "certified copy of which patent is attached to and made part "of the complaint in the action of Wm. H. Lakin vs. The "Sierra Buttes Gold Mining Company, in the Circuit Court "of the United States, Ninth Circuit for the District of Cali-
"fornia, No. 2693, which copy of said patent and the
44 "judgment-roll in said action are hereby referred to and
"made part of this agreed statement of facts; subject to "the objection of defendants that the said judgment-roll is not "competent proof as against the defendants except as a con-"veyance; that said patent and the portion of said patented "premises awarded by the judgment in said action to Wm. "H. Lakin includes the premises in controversy in this action. "It is further agreed that plaintiff's Exhibit No. 1 on file in "said action, which is hereby referred to, correctly shows all "the proceedings had upon the application for said patent and "is made part of this agreed statement of facts, subject to the "objections of plaintiff that it is not competent for defendant "to use any part thereof for the purpose of assailing the "validity of said patent. Said exhibit shows correctly all the "notice which was given of said application. It is further "agreed that any and all exhibits and testimony on file in said "action of Wm. H. Lakin vs. The Sierra Buttes Gold Min-"ing Company may be taken and considered as if offered in "evidence in this cause, subject to the objection that any par-"ticular exhibit or evidence used and referred to by either "party is irrelevant, immaterial and incompetent.

"It is agreed that the lands in dispute are situated in the "Jamison Quartz Mining District in Plumas county, State of "California, and that defendants are to procure and file, as "an exhibit on their part, a written or printed copy of the "mining rules adopted in said District prior to 1867, authen-"ticated by affidavits taken *ex parte*, or may file *ex parte* affi-"davits showing their contents and date of adoption by "persons who will depose that they have seen such written or "printed rules and know their contents of their own knowl-
"edge, and showing that said rules were lost or de-
45 "stroyed, and when and how said loss or destruction
"occurred, subject only to the objection of plaintiff "that any proof of said rules is irrelevant, immaterial and in-"competent, and that said affidavits do not conform to this

"agreement and that plaintiff may file counter affidavits as to "the contents of said rules, subject to the same qualifications "and objection as an exhibit on the part of plaintiff, if desired.

"It is further agreed that defendants are to procure and "file, as an exhibit on their part, a certificate of the County "Recorder of Plumas or Butte county, showing the character "of all lode locations in said District prior to 1868 in respect "to the number of feet along the lode claimed by each claim "and the extent of surface or that no surface was claimed in "the notice of location, said certificate to be taken as evidence "of the custom of miners in said District, subject only to the "objection that any proof of such custom is irrelevant, imma- "terial and incompetent, it being further agreed that if plain- "tiff desires to furnish a supplemental certificate of said Re- "corder showing locations of lodes in said District prior to "1868, not included in defendants' certificate, the same may "be filed as plaintiff's exhibit.

"It is agreed that the town of Johnsville has now and for "more than ten years last past has had a population of about "two hundred persons; that during said time it has been laid "out into streets and lots and used by said population as a "trade or business center for the surrounding country; that "a plat of said town was surveyed in the summer of 1889 by "A. W. Keddie, and filed with the county recorder of Plumas "county, and that a correct copy of said plat is attached to "the answer in this cause; that the land occupied by
46 "said town is not within one thousand feet of the lode "line, as described in the patent to plaintiff's grantor, "and that the greater part thereof is not within two hundred "feet of Jamison creek; that the said lode line of the 2,000 "feet extension of the Mammoth Ledge claimed by plaintiff, "has never been opened or developed, and that the actual "trend of said extension of the lode upon the patented ground "is not known, but that developments in the working of the "2,100 feet of the Mammoth Ledge still held and worked by "the Sierra Buttes Company in a northeasterly direction to a "point about 500 feet southwest from the southwest end of "the said extension, indicate an actual trend of the lode, "which, if continued in the same direction northeasterly "through the plaintiff's part of the patented premises, would "pass through the village of Johnsville, this latter fact being, "however, agreed to subject to the objection of defendants "that it is irrelevant, immaterial and incompetent.

"It is further agreed that the land described in the com-

"plaint, and upon which the said town is situated, has never "been sectionized by the Government of the United States "nor in any manner surveyed by the Government other than "by the survey made in proceedings to obtain the patent to "the Mammoth Quartz Mine, under which plaintiff claims "title, and is mineral land.

"It is further agreed (subject to the objection of plaintiff "that the facts are irrelevant, immaterial and incompetent to "be received as evidence) that there was but one notice of "location of the 2,000 feet extension of the Mammoth Ledge, "which is the notice dated November 4, 1865, and filed as "one of the exhibits above referred to in the case of Lakin
"vs. The Sierra Buttes Gold Mining Company, and
47 "that no definite claim of surface was made in connec-
"tion with said location until a survey was made, upon "which the application for a patent is based, and that no loca-"tion of surface was recorded upon the records of Plumas "county prior to said patent.

"It is further agreed that one John Banks entered upon a "portion of said premises at the date of the record of the "claim or claims made by him and recorded upon the records "of Plumas county, a duly certified copy of which claim or "claims is to be procured by defendants and filed as an ex-"hibit on the part of defendants in this action, subject to the "objection of plaintiff that the same is irrelevant, immaterial "and incompetent, and that thereafter the claim or claims of "said Banks passed by mesne conveyances to a portion of "said defendants; certified copies of which mesne convey-"ances are to be procured by defendants and filed as an ex-"hibit for defendants, subject to the same objection. It is "further agreed that subsequent to the date of said patent "the defendants, A. Curtis, Joseph H. Fletcher, D. Robinson, "M. Willoughby, John Willoughby, O. B. Dolly, H. S. Dunn, "J. H. Bacher, John Daly, S. Soracco, A. Grazier, Mrs. M. "Kerr, and the grantors of defendants, B. F. Jones, successor "to Joseph H. Fletcher, Antonovich, M. A. Passetta and "John Neville, paid a small sum as rent to the Sierra Buttes "Gold Mining Company for the privilege of occupying said "premises, to wit, in the year 1883; that the remainder of "said defendants entered upon the premises occupied by "them upon said patented land since the year 1883, some of "them with the express permission of said Sierra Buttes "Company, and the remainder who did not ask permission,

"entered with the understanding that said Sierra Buttes
48 "Company did not object to occupation of village lots,
"provided its use and enjoyment of the patented prem-
"ises was not interfered with.

"That said patent was issued to the Mammoth Gold Min-
"ing Company, May 18, 1877; that said patented premises
"were conveyed by said patentee to the Plumas Eureka Min-
"ing Company, December 11, 1877, and by said Plumas
"Eureka Mining Company to the Sierra Buttes Mining Com-
"pany, December 26, 1877; that the whole of said patented
"premises were assessed for taxes each year from 1878 to 1888
"inclusive to the said Sierra Buttes Gold Mining Company,
"which paid all taxes assessed upon said land for each of said
"years; that said defendants were assessed for each year
"since 1883, only upon the improvements listed by them
"upon the portion of said patented premises occupied by
"them, said assessments describing said improvements, as set
"forth in a certificate of the County Recorder of Plumas
"county, to be procured and filed in this action by defendants
"as exhibit, showing the description contained in said assess-
"ments for each of said years; and that said defendants paid
"the taxes so assessed to them for each of said years.

"That in the spring of 1889 the plaintiff, after he had ac-
"quired his said judgment against the Sierra Buttes Gold
"Mining Company, enforcing a trust in the portion of said
"patented premises, which includes the premises in contro-
"versy, notified the defendants that they must either pay rent
"to plaintiff for the portion of said land occupied by them, or
"purchase said land, or quit the said premises and remove their
"improvements therefrom within thirty days from the date of
"said notice; but that said defendants neglected and refused
"to do either of said requirements, and still remain in posses-
"sion of the premises described in their answer.

49 "It is agreed that quartz miners of Jamison District,
"who opened and worked mines on Eureka Mountain,
"actually occupied such portion of public land as they chose
"for the purpose of working their mines, the extent of such
"occupation not being a matter of defined custom, but of
"actual possession; but that there was no actual possession
"of the land on which the village of Johnsville is situated, ex-
"cept the road leading across the same from the Mammoth
"Mine to the Mammoth Mill and to Jamison City. The fore-
"going facts being objected to by defendants as irrelevant,
"immaterial and incompetent.

"It is agreed that all the exhibits filed in the case of Wm. "H. Lakin vs. O. B. Dolly, on the motion of plaintiff to vacate "the verdict and judgment and to grant a new trial in that "case, shall be taken and considered as if filed in this case, "and that only such exhibits as are peculiar to the defendants "in this case need be filed herein, and that all the provisions "of the agreement in said case in respect to time of filing ex- "hibits are applicable to this case.

"It is further agreed that this cause shall be brought on for "hearing upon this submission by either party after all ex- "hibits shall have been filed ten days after service of notice "of said hearing; but that there shall be no oral argument "upon said hearing unless both parties are present, but the "final submission, in the absence of either party, shall be "upon briefs to be filed by the parties within such time as "may be agreed upon or allowed by the Court; and that the "time for the hearing of both causes shall be fixed upon the "same day.

"Dated April 28, 1890.

" H. L. GEAR,

" *Attorney for Plaintiff.*

" GOODWIN & GOODWIN,

" *Attorneys for Defendants represented by them.*"

50 The record, exhibits and documentary and other evidence appearing in the case of Wm. H. Lakin vs. The Sierra Buttes Mining Company, referred to in the foregoing agreed statement of facts, shows in substance that in July, A. D., 1851, an association of persons, composing what was called the Mammoth Company, located 2,100 feet of a quartz ledge on Eureka Mountain in Jamison Mining District, Plumas county, California, claiming that portion of the ledge, with all of its dips, spurs and angles, but not specifying any claim of surface adjacent to the ledge; that at the time of said location, the Company located and recorded in their records a claim of a tract of land on Jamison creek, which flows in a valley at the westerly base of the mountain, claiming three hundred yards on each side of Jamison creek, and eight hundred yards in length along the creek for mill privileges and for the timber it contained for the purpose of working the mine, and thereafter built a mill on this tract, between the ledge and the creek, run tunnels on the westerly slope of the

mountain and constructed a wagon road and tramway extending from the tunnels to the mill, across what is now the site of the village of Johnsville, which lies between the old mill and the lode line, and is situated on a flat at the base of the mountain, the site of the present village beginning about 1,000 feet easterly from the Mammoth lode line, and extending about 700 feet in width toward Jamison creek to a line about 200 feet distant therefrom.

That on November 4, 1865, the then owners of the original Mammoth claim, James M. Thompson and John B. McGee, with eight other persons, under whom they afterwards claimed title, located a northeasterly extension of 2,000 feet of said Mammoth lode, with its dips, spurs and angles, but did
51 not specify in their notice of location any additional claim of surface ground. The actual direction of said extension of said lode was obscured, and was not known at the time of said location, or at any time thereafter, farther than as has been indicated by the workings in the original Mammoth ledge, and the general direction of the foot wall rock.

That on the 26th of August, 1867, said Thompson and McGee procured one D. D. Brown, a United States Deputy Mineral Surveyor to make for them a survey of said 4,100 feet of lode line and 252 and 95-100 acres of surface ground, including a strip of ground 50 feet northwest of the lode line as located, and a tract of land lying southerly and easterly therefrom, extending to and across Jamison creek, and also including the original Mammoth Mill site claim on both sides of the creek. The said survey included the whole of the present site of Johnsville, no part of the village being then in existence, and included all of the land in controversy in this action. Said surveyor located and marked monuments upon the land surveyed for the boundaries thereof, and said survey was made as the basis of an application for a patent for said land, by said Thompson and McGee, and was afterwards approved by the surveyor-general, as the final survey of said land for which a patent was issued for the whole of the land so surveyed.

That on the 30th day of August, 1867, said Thompson and McGee posted in a conspicuous place on said land, a diagram of said survey, attached to a notice bearing that date and stating "that they intend to apply for a patent for the vein or "lode set forth in the above diagram called the Mammoth "quartz claim, situated in the Jamison Mining District,

"County of Plumas, California, and now post this notice in a "conspicuous part thereof."

52 That on the 7th day of September, 1867, said McGee and Thompson caused to be published in the Plumas *National*, a weekly newspaper, published in said County of Plumas, the following notice:

"The undersigned give notice that they intend to apply "for a patent for the vein or lode known as the Mammoth "quartz claim, situated in the Jamison Mining District, "County of Plumas, State of California, and now post this "notice on a conspicuous part thereof; commencing at an "iron pin drilled into a rock on the line dividing the Mam-"moth claim from the Eureka claim, and running thence for "the center of the vein northeast 4,100 feet, and including "the land between the lode and Jamison Creek for working "purposes.

"Dated on the ground this 30th day of August, 1867.

" JOHN B. McGEE.

" JAMES M. THOMPSON."

And they caused such publication to continue for ninety days thereafter.

Exhibit No. 1, on file in the action of Wm. H. Lakin vs. The Sierra Buttes Gold Mining Company, referred to in the agreed statement of facts in this cause, is an exemplified copy of all the proceedings had in the Land Department of the United States, upon which was based the patent under which plaintiff claims title to the premises in controversy, and it appears from said Exhibit No. 1 that on the 11th day of September, 1867, said Thompson and McGee made application to the Land Office at Marysville for a patent for the lode and land included in said diagram of survey under the Act of Congress of July 26, 1866, alleging that they were the present

53 owners of the Mammoth quartz claim in the Jamison Mining District, County of Plumas, and State of California, and that as an association of persons they had theretofore occupied and improved the same in accordance with the local customs and rules of the mines in said District, and had expended in actual labor and improvements thereon an amount not less than one thousand dollars, that there was no controversy within the petitioner's knowledge as to said claim; and further alleging that they therewith presented a diagram of said mining claim so extended as to conform to

the rules of said mining district, and making other allegations as required by said Act of Congress, and requesting in said application that the Register of the Land Office for the Marysville District do publish according to said Act, a notice of their intention to apply for a patent in the Plumas *National*, a paper published at Quincy, in the County of Plumas, California, being a paper published nearest the location of said claim; and that on said 11th day of September, 1867, the Register of said Land Office made an order that the notice of said intention to apply for a patent be published for ninety days in said Plumas *National*.

Said Exhibit No. 1 further shows that on the 27th day of February, 1877, the Register of said Land Office certified to said surveyor-general, "in relation to the application No. 27 "of J. B. McGee and James M. Thompson for patent to "Mammoth Mining Claim, situated in Plumas County, Cali- "fornia," "that the records and files of this office show that the "above application No. 27 for a patent to said mining claim, "together with a copy of the diagram and notice thereof, were "filed in this office on the 11th day of September, 1867; that "on the same day the copy of said notice and diagram were "duly posted in this office, and remained so posted for the "period of ninety consecutive days; that said notice and
54 "diagram were duly posted on said claim on the 30th "day of August, 1867, and remained so posted for "ninety consecutive days; that upon the order of the Regis- "ter of this office, a copy of said notice was duly published in "the Plumas *National* for said period of ninety days, the same "being a newspaper published at Quincy in Plumas County, "State aforesaid; that no claim exists against the United "States Government for the cost of said publication, all "claims therefor having been waived by an agreement duly "filed with such application;" and "that no adverse claim to "any portion of said mining claim has been filed in this office."

Said Exhibit No. 1 further shows that on the 2nd day of March, 1877, said Surveyor-General returned to said Land Office his first survey of the premises applied for, that which was designated by said Surveyor-General as Lot No. 44, and which certified to the said Land Office that the attached field notes of the preliminary survey of the mining claim, known as the Mammoth Quartz Mine, claimed by John B. McGee and James M. Thompson, executed by D. D. Brown, U. S. Deputy Mineral Surveyor, in the month of August, 1867, were adopted as the final survey of said premises; that the

field notes and report of said preliminary survey of said D. D. Brown, attached to said certificate of said surveyor-general, certified that on the 28th day of August, 1867, there were three tunnels on the claim, designated as the "upper," "middle" and "lower;" that there was a mill for reducing the rock on Jamison Creek, worked by water in a ditch taken from the creek, and that there was plenty of timber near the mill for all purposes; that said Exhibit No. 1 further shows that
on the 2nd day of March, 1877, the Mammoth Gold Min-
55 ing Company, by Wm. Letts Oliver, its secretary, filed in
said Land Office an affidavit of said Wm. Letts Oliver, stating in substance that said Company became the purchaser of said Mammoth Quartz Lode, June 7, 1870, and went into possession of the same and of all the surface ground included in the application of said Thompson and McGee for a patent, and have remained in the continuous occupancy and possession thereof from that date and had caused tunnels to be run and valuable improvements erected at an expenditure of not less than $50,000. Said Exhibit No. 1 further shows that on the 3rd day of March, 1877, one R. M. Wilson filed in said Land Office an affidavit taken before the Register of the Land Office, who certified that said affiant was a credible and respectable person, which affidavit stated that the affiant was a Deputy Mineral Surveyor for the State of California, and within the line of his official duties had within the last twelve months, prior to said date, made diligent search and inquiry in the old Jamison Mining District, Plumas County, California, for missing records and mining rules and regulations for that District, but was unable to find any and that he believed that neither records or mining rules or regulations existed there at that time, and further believed that none had been in existence in said District for many years; that everything relating to mines or mining claims, that have become a matter of record since 1870, has been recorded in the County Recorder's office for said County of Plumas. Said Exhibit No. 1 further shows that there were filed in said Land Office by said Mammoth Gold Mining Company certain conveyances
in support of its claim of title to said Mammoth Mine
56 as the successor in interest of said Thompson and Mc-
Gee, a copy of its certificate of incorporation, and an abstract of the records of Plumas County certified by the County Clerk, showing the state of said records, as affecting the title to said mine, and that there was no pending litigation concerning it; and that on the 17th day of March, 1877, said

Mammoth Gold Mining Company, a corporation, was allowed to purchase and enter said "Lot No. 44," and that on that date the following certificate of entry was made and issued to said Mammoth Gold Mining Company.

"REGISTER'S FINAL CERTIFICATE OF ENTRY.

"Mineral Entry No. 62 } U. S. Land Office at Marysville, Cal.
"Lot No. 44. } 17th March, 1877.

"It is hereby certified that in pursuance of the Mining Act "of Congress, approved July 26, 1866, the Mammoth Gold "Mining Company, (a corporation) (assignee or successor in "interest of John B. McGee and James M. Thompson), whose "postoffice address is San Francisco, California, on this day "purchased that mineral claim or lot of land of Section in "Township No. 22, North of Range 11 E. Mt. Diablo Base "and Meridian, situate, lying and being in the Jamison Min- "ing District, in the County of Plumas and the State of Cali- "fornia, known as Mammoth Quartz Mining Claim, embrac- "ing 4.100 linear feet of the Mammoth Quartz Mining "Claim, vein or lode, with 252 and 95-100 acres of sur- "face ground, as shown by said survey, for which the said "Mammoth Gold Mining Company has this day made pay- "ment to the Receiver in full, amounting to the sum of "Twelve Hundred and Sixty-five ($1,265) Dollars. Now,
"therefore be it known, that upon presentation of this
57 "certificate to the Commissioner of the General Land
"Office, together with the plat, survey and description "of said claim, a patent shall issue thereupon, if all be found "regular."

" CHAS. M. PATTERSON, *Register*."

The patent referred to in said agreed statement of facts recites that "In pursuance of the provisions of the Revised Statutes "of the United States, Chapter Six, Title Thirty-two, there "have been deposited in the General Land Office of the "United States the plat and field notes of survey of the claim "of the Mammoth Gold Mining Company upon the Mam- "moth Quartz Mine, accompanied by the certificate of the "Register of the Land Office at Marysville in the State of "California. whereby it appears that in pursuance of said

"Revised Statutes of the United States, the Mammoth Gold "Mining Company did, on the seventeenth day of March, "A. D. 1877, enter and pay for said mining claim or premises, "being mineral entry No. 62, in the series of said office "designated by the Surveyor General as Lot No. 44," giving the contents and metes and bounds of said survey in full; and purports "In consideration of the premises, and in conform- "ity with the said Revised Statutes of the United States." to grant to said Mammoth Gold Mining Company and to their successors and assigns the said mining premises hereinbefore described in Lot No. 44, etc., including 4,100 feet of the said Mammoth Quartz Mine, vein, lode, ledge or deposit, and also "of all other veins, lodes, ledges or deposits, throughout "their entire depth, the tops or apexes of which lie inside the "exterior lines of said survey."

All of the title of said Mammoth Company in said
58 patented premises passed by mesne conveyances to the Sierra Buttes Gold Mining Company, and it appears from the judgment roll in the said action referred to in said agreed statement of facts, that the title of the plaintiff to the premises claimed by him was obtained through the enforcement of a trust by said plaintiff Wm. H. Lakin, against said Sierra Buttes Gold Mining Company, in said action by the judgment of this court rendered therein on the 19th day of November, 1888, whereby and in pursuance of which there was set off and conveyed to said Wm. H. Lakin, as part and parcel of said patented premises the land and premises described in the complaint in this action.

Pursuant to said stipulation the defendants filed as exhibits to be used in this action on their part the affidavits of John S. Graham, J. D. Byers, Geo. Woodward, Sol Babb, John P. Hills, and A. Jump, each stating in substance that the original mining rules adopted by the miners of Jamison Mining District, were destroyed by fire in the year 1862; that rules in writing for said District were adopted at a meeting of miners in 1851, and that the affiant was familiar with said rules. The affidavit of John S. Graham states that the rules originally authorized each person to locate not to exceed 30 feet on a quartz ledge or lode, and not to exceed 250 feet on each side of said 30 feet of ledge located, and that the rules were subsequently changed so as to limit the location of a quartz claim to twenty feet along the ledge including the dips, spurs, and angles. The affidavit of J. D. Byers states that the size of quartz claims required by the laws adopted

in 1851 was twenty feet to each man along the course of the ledge including the dips, spurs, and angles; that he could not remember the exact amount of surface ground
59 authorized to be located on each side of a lode claim, but is certain it did not exceed 100 feet on each side of the lode or vein located. The affidavit of Geo. Woodward states that said written rules adopted in 1851, authorized each person to locate not to exceed thirty feet along the line of the lode or ledge, with all of the dips, spurs and angles of the ledge, and to hold surface ground on each side of the ledge or vein not to exceed one hundred feet. The affidavit of Sol Babb states that the rules originally authorized each person to locate not to exceed thirty feet on a quartz ledge or lode, and not to exceed one hundred feet on each side of said thirty feet of ledge located, and were subsequently changed so as to limit the locator of a quartz claim to twenty feet along the ledge, including the dips, spurs and angles. The affidavit of John P. Hills states that said written laws originally authorized each person to locate twenty feet along the lode or vein; that he did not remember definitely the amount of surface ground on each side of the lode which each claimant could hold, but is certain that the rules did not authorize the location of more than one hundred feet on each side of the ledge, and knows of no change authorizing any greater amount of surface ground. The affidavit of A. Jump states that in 1851 and 1852 he had in his possession a copy of the local rules and records of Jamison Mining District, and became well acquainted with them, and the said rules authorized each miner to locate not to exceed 20 feet on a quartz ledge or lode including the dips and angles thereof. This last affidavit appears to have been prepared in blank by some other person before the filling up of the same and signature thereof by said Alemby Jump, and the following words are erased therefrom "and not to exceed feet on each side of said feet of ledge so located." The plaintiff filed as counter-exhibits on his part the affidavits of James M. Thompson, John B. McGee, John McBeth, M. D. Howell, J. M. Miller
60 and C. W. Bush, each stating in substance that the affiant was familiar with the laws adopted by the miners of Jamison Mining District in 1851, and that the same contained no provision in regard to the amount of surface ground which might be occupied by the locator of a quartz ledge; that such locators were allowed to occupy and use any surface not previously occupied by others for the purpose of working

their claims, and that gravel claims only were limited by said laws to 100 feet in breadth of surface; and that the laws adopted were disregarded shortly after their passage. The affidavits of James M. Thompson, John B. McGee, and John McBeth further state that the owners of quartz mines in the vicinity of the Mammoth, as well as the Mammoth Company occupied surface for working purposes for a distance of more than 1,000 feet from the vein. The affidavit of James M. Thompson further states that at the time of the location of the Mammoth Extension of 2,000 feet in 1865 he made diligent inquiry as to the existence of miner's rules in said District at that time, and then ascertained that the old laws had been disregarded and that no laws relating to the location of quartz or placer claims in said District were then in existence. The affidavit of John McBeth further states that he was one of the locators of the original Mammoth Quartz Claim; that the Eureka claim was first located 30 feet to the man along the vein; that the Seventy Six Company then passed laws limiting the claim to 20 feet along the vein, but the Mammoth Company was subsequently located and claimed 30 feet to the man, and the provisions of the laws as to the length of vein were not enforced after 1852. The affidavits of C. W. Bush and J. M. Miller further state that they were members of the Eureka Company which was the first quartz claim located in Jamison Mining District and were locators of said claim in 1851, which claimed 30
61 feet of vein to each locator; that the Seventy Six Company was afterwards formed and subsequently the Mammoth; that the Seventy Six Company claimed that the Eureka Company had taken up too much vein, and attempted to pass laws in which the Eureka Company took no part, making a quartz claim 20 feet in length along the vein; that the Eureka Company never acknowledged the laws adopted by the Seventy Six Company and they soon became a dead letter.

Pursuant to said stipulation, defendants filed as an exhibit on their part, a certified abstract of all lode locations made in Jamison Mining District, and recorded upon the records of Plumas County prior to 1868, as evidence of the custom of miners in said District as to extent of vein and surface claimed by locators of ledges therein; and that said exhibit shows that in the year 1856 two locations were recorded, one by three persons claiming 125 feet of the lode with its dips, spurs and angles, without mention of surface,

and the other by five persons claiming 275 feet "embracing all the dips and angles of the ledges together with surface ground necessary to work the ledge." In 1859 eight locations were recorded, the first four making no mention of surface ground and claiming 100 feet of ledge to each locator along the ledge, with its dips, spurs and angles. The other four were locations of 200 feet of ledge to each locator with one claim for discovery, claiming the ledge with all its dips, spurs, angles and branches to the width of 500 feet. In 1860 eight locations were recorded, one by fourteen claimants of 3,000 feet of ledge without mention of surface ground, the other seven being at the rate of 100 feet of vein to each locator, including all dips, spurs and angles of the ledge, four of them making no mention of surface, two others calling for

"sufficient ground on either side for fully developing
62 and working the same," one other containing the words

"together with all necessary appurtenances thereto for working and developing the ledge," one calling simply for "appurtenances" and the remaining one of the eight containing the words "together with all appurtenances necessary for developing the ledge." In 1862 three locations were recorded, two of them by locators claiming at the rate of 100 feet each, and the third by eleven locators claiming 2,500 ft. of ledge, all three locations claiming all dips and angles of the ledge without mention of surface ground. In 1863 two locations were recorded, one by seven locators claiming 100 feet and all quartz lodes within 125 feet of the ledge "and "sufficient ground upon each side thereof for the convenience "of working the same;" and one by thirty locators of 3,000 feet of ledge and all quartz veins within 125 feet, "also all "the land, wood and water within twenty rods of the said "ledge." In 1864 one location was recorded by fifteen persons of 2,000 feet of ledge, "with all dips, spurs and angles of the same" with no mention of surface ground. In 1865 six locations were recorded, three of them making no reference to surface ground, two claiming 200 feet, and one claiming 100 feet on each side of the ledge. Two of them claimed 100 feet of vein to each locator, and the other four claimed 200 feet of vein to each locator, one of these being the Mammoth Extension claim of 2,000 feet located by James M. Thompson, John B. McGee and eight others. In 1866 two locations were recorded, one by five locators claiming 1,200 feet of ledge, with all its dips, spurs and angles, without mention of surface ground, and the other by six

locators claiming 200 feet each, with 150 feet of ground on each side of the ledge.

Pursuant to said stipulation the defendants filed as
63 an exhibit a certified copy of the recorded claim of John Banks, which shows that on the 20th of June, 1876, said John Banks recorded upon the records of Plumas County a notice of a claim of twenty acres of land "for building and "agricultural purposes" and described as follows: "Com- "mencing at a certain spruce tree situated on the west bank "of Jamison Creek on the N. E. line of the Mammoth Mill "ground, thence along said line in a N. W. direction to the "base of the mountain; thence in a N. E. course along the "base of the mountain ninety yards; thence in a S. E. course "by a large cedar and a dead pine tree to the brow of said "flat; thence up the brow of said flat to the place of begin- "ning." The defendants filed no exhibits showing any conveyance from said John Banks to any person, and filed no exhibit or exhibits on their part showing the mode in which taxes on improvements were assessed to the defendants.

This bill of exceptions incorporates the substance of all exhibits, documents and evidence referred to in said agreed statement of facts in said stipulation, and said stipulation was complied with as to the time and manner of filing exhibits except as above stated, and as to the submission of said cause.

Upon the hearing and consideration of said cause the Court over-ruled the objection of plaintiff that any proof of the mining rules of Jamison Mining District adopted prior to 1867 was irrelevant, immaterial and incompetent, and admitted and considered evidence of said rules in the decision of said cause, to which ruling plaintiff duly excepted.

The Court also over-ruled the objection of plaintiff that any proof of the custom of miners in said district was
64 irrelevant, immaterial and incompetent, and admitted and considered evidence of said customs in the decision of said cause, to which ruling plaintiff duly excepted.

The Court also over-ruled the objections of plaintiff to the certified copy of the claim of John Banks, that the same was irrelevant, incompetent and immaterial, and admitted and considered evidence of said claim in the decision of said cause, to which ruling plaintiff duly excepted.

The Court filed its findings of fact and rendered judgment herein on the 31st day of October, 1891, and plaintiff served a draft of his proposed bill of exceptions on Goodwin and

Goodwin, attorneys for said defendants by mail on the 7th day of November 1891.

The plaintiff specifies and assigns the following errors of law committed by the Court in the trial and decision of said cause.

1st. The Court erred in over-ruling the objection of plaintiff to proof of the mining rules of Jamison Mining District.

2nd. The Court erred in over-ruling the objection of plaintiff to proof of the custom of miners in said District.

3rd. The Court erred in over-ruling the objection of plaintiff to proof of the claim of John Banks.

4th. The decision of the Court is against law in allowing the patent under which plaintiff claims title to be assailed by the defendants in this action.

5th. The decision of the Court is against law in holding that said patent is void as to any of the land occupied by the defendants, or as to any part of the premises therein described.

6th. The decision of the Court is against law in holding that at the time this action was commenced plaintiff did not own, or was not entitled to the possession of the land occupied by the defendants.

65

7th. The decision of the Court is against law in deciding that as to any of the said defendants the said action should be dismissed, and in awarding judgment to any of them for their costs and disbursements.

Plaintiff also specifies the following particulars wherein the evidence is insufficient to justify the decision of the Court.

1st. Neither the evidence nor the agreed statement of facts justifies the finding or decision by the Court "that there "was not at any time prior to 1868 any law, usage or custom "in force in Jamison Mining District authorizing the location "or occupancy of more than 100 feet of surface ground on "each side of the lode located," but the evidence and the agreed statement of facts show the contrary facts to be true, and conclusively show that Thompson and McGee at the time of their application for a patent in 1867 had theretofore occupied and improved the premises applied for in accordance with the local customs and rules of the miners in said District; and that there was then no controversy as to their claim to the whole of said premises; and that there was then no

mining rule or custom in force precluding their occupancy of the whole thereof or their application for a patent for the whole of said premises or the granting of a patent for the same.

2nd. Neither the evidence nor the agreed statement
66 of facts justifies the finding or decision of the Court that "no surface ground was claimed along the line of "said Mammoth lode" or the implied finding or decision that no surface ground parallel to said lode was claimed by the locators thereof; but they show on the contrary that the locators of said Mammoth lode claimed and located a tract of land parallel with said lode and including Jamison Creek, for working purposes, about the time of the location of said lode which claim included said creek and three hundred yards upon each side thereof within the limits of the patented premises and that they built a mill and claimed and used lumber on said tract for working purposes.

3rd. Neither the evidence nor the agreed statement of facts justifies the finding or decision that there was no possession of the land in controversy for mining purposes prior to the issuance of the patent, but both of them show on the contrary that there was constructive possession of the whole thereof for said purposes before said patent was applied for.

4th. Thete is no evidence nor any agreed facts to justify the finding that there was a custom in force in Jamison Mining District from 1856 to 1868 to record all notices of mining locations in the office of the County Recorder of Plumas County.

5th. Neither the evidence nor the agreed statement of of facts justifies the finding or decision that no other notices than these set out in the 5th finding of fact were posted and published in the proceeding to obtain said patent; but show
on the contrary that said proceedings were regularly
67 conducted in respect to the posting and publication of all notices of the application for said patent.

6th. Neither the evidence nor the agreed statement of facts justifies the finding or decision that McGee and Thompson took no other or further steps to procure a patent for said claim but show on the contrary that they took all the steps necessary to forestall any opposition of any claimant to said premises or any part thereof.

7th. There is no evidence or agreed facts to justify the finding or decision that one John F. Banks on the 17th of June, 1876, entered upon and located twenty acres of land

upon which the town of Johnsville is now situated or to justify the implied finding that said Banks was ever in possession or had the right of possession of any part of the said land, or of any part of the premises in controversy.

8th. There is no evidence or agreed fact to justify the finding or decision that any part of the claim of said Banks passed by mesne conveyances to any defendant or defendants residing in the town of Johnsville.

9th. Neither the evidence nor the agreed statement of facts justifies the finding or decision that plaintiff at the time the action was commenced was not the owner of nor entitled to the possession of the land occupied by the defendants, but they both show on the contrary that plaintiff is and was at the time of the commencement of this action the owner of and entitled to the possession of all the premises described in the complaint of plaintiff herein.

H. L. GEAR,
Attorney for Plaintiff.

The foregoing bill of exceptions is hereby allowed and settled as being correct, Dec. 30th, 1891.

HAWLEY, *Judge.*

68 Endorsed: Service of within received by mail Nov. 10th, 1891.

GOODWIN & GOODWIN.,

Filed December 30, 1891. L. S. B. Sawyer, Clerk.

69 *Opinion.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WM. H. LAKIN, Plaintiff, vs. O. B. DOLLY, Defendant.		No. 10,596.
and		
WM. H. LAKIN, Plaintiff, vs. J. H. ROBERTS, ET. AL., Defendants.		No. 10,630.

These cases are actions of ejectment. The Dolly case is submitted on a stipulation "That defendant may move to set aside the judgment and for a new trial of the above entitled action without previous service of notice of intention and without showing of facts constituting surprise or excuseable neglect as a ground of the motion, it being agreed that if the facts hereinafter stipulated do as matter of law show a right of the defendant to defend the action successfully as against the plaintiff, under the pleadings defendant is entitled to a new trial of said action upon the ground of surprise and excuseable neglect, and that if such right so appears the said judgment may be set aside upon condition of the payment of the costs of plaintiff included in said judgment, and the
70 judgment then be rendered in favor of defendant for his costs; but that if said facts do not show such right of successful defense as matter of law the motion of defendant is to be denied, and the verdict and judgment in favor of plaintiff are to be and to remain final."

The Roberts case is submitted by agreement of counsel upon the agreed statement of facts filed in the Dolly case.

From the agreed statement and the various exhibits referred to, the following among other facts are made to appear: viz.—That plaintiff holds the title to the premises in controversy, that was acquired by the patent of the United States to the Mammoth Gold Mining Company; that the lands in controversy are mineral lands and are situated with-

in the Jamison Quartz Mining District in Plumas County and embrace the land upon which the town of Johnsville is situate; that the patent issued to the Mammoth Gold Mining Company on the 18th day of May 1877, although it purports upon its face to be issued in pursuance of the Revised Statutes of the United States upon an entry made by the Mammoth Company, March 17th, 1877, was applied for by John B. McGee and James M. Thompson under the law of 1866, on Agust 30th, 1867; that the patent embraces two separate locations and conveys 4,100 feet of a gold bearing quartz lode with 252.95 acres of land; that the actual trend of the extension of the Mammoth lode upon the patented ground is unknown; that the lode as marked on the patent as well as located and fixed on the surface of the land, is in a straight line along the west or northwest boundary of said patented tract and is within fifty feet of said line; that the surface tract covered by the patent except said fifty feet is on the
71 east or southeast side of said lode and extends about three fourths of a mile therefrom; that the written laws adopted in 1851 by the miners of the Jamison Quartz Mining District, governing the location of quartz claims therein, made no provision for the location of surface ground in connection with quartz location in excess of one hundred feet on each side of the lode; nor was there any law, usage or custom authorizing the location or occupancy of more than one hundred feet of surface ground on each side of the lode; that the "Quartz miners of Jamison District who opened and worked "mines on Eureka Mountain actually occupied such portion "of public land as they chose for the purpose of working "their mines, the extent of such occupation not being a "matter of defined custom but of actual possession, but " * * * there was no actual possession of the land on "which the village of Johnsville is situated except the road "leading across the same from the Mammoth mine to the "Mammoth Mill and to Jamison City;" that in 1867 McGee and Thompson procured a survey of the Mammoth claim and extension and of the exterior boundaries of the surface ground and had a diagram thereof made and thereupon, on the 30th day of August 1867, they posted on said Mammoth claim the following notice: "The undersigned give notice "that they intend to apply for a patent for the vein or lode "set forth in the above diagram called the Mammoth Quartz "Claim, situated in the Jamison Mining District, County of "Plumas, California, and now post this notice on a conspicu-

"ous part thereof. Dated on the ground this 30th day of "August, 1867.

"JOHN B. McGEE,
"JAS. M. THOMPSON."

72 That on the 7th day of September 1867 they published in a local newspaper for the period of ninety days the following notice: viz.—"The undersigned give notice "that they intend to apply for a patent for the vein or lode "known as the Mammoth Quartz Claim, situated in the "Jamison Mining District, County of Plumas, California, and "now post this notice on a conspicuous part thereof: Com- "mencing at an iron pin drilled into a rock on the line divid- "ing the Mammoth Claim from the Eureka Claim, and running "thence for the center of the vein northeast 4,100 feet, and "including the land between the lode and Jamison Creek for "working purposes. Dated on the ground this 30th day of "August, 1867.

"JOHN B. McGEE,
"JAS. M. THOMPSON."

That on the 17th day of June 1876 one John F. Banks entered upon and claimed twenty acres of land upon which the town of Johnsville is now situate, and located the same for building and agricultural purposes; that his claim thereto was recorded upon the records of Plumas County prior to the issuance of the patent to the Mammoth Company; that by certain mesne conveyances this tract of land has become vested in the defendants; that for more than ten years last past the town of Johnsville has been the center of trade and business of that section of country, with a population of over two hundred persons and laid off into streets, lots and blocks; that no portion of this tract of land occupied by defendants is within one thousand feet of the lode described in the patent; that said land has never been sectionized by the Government of the United States nor in any manner surveyed by the Government of the United States other than by the
73 survey made in the proceeding to obtain the patent to the Mammoth Quartz Lode under which plaintiff claimed title; that in the summer of 1883, for the first time the Sierra Buttes Mining Company from which complainant claims title demanded of the citizens of Johnsville that they should pay nominal rent to the Company for the land occupied

by them as town lots; that the defendant Dolly and several of the defendants in the Roberts case paid from one to five dollars each and no other or further (or further) payments of rent from them was ever demanded until the spring of 1889; that the other defendants in the Roberts case who entered upon the land subsequent to 1883, either obtained permission of said Company or entered upon the land with the understanding that the Sierra Buttes Gold Mining Company, did not object to the occupancy of the town lots as long as the enjoyment of its rights in the premises were not interfered with; that the lands embraced in the patent were assessed for State and County purposes from 1878 to 1888 to the mining company and it paid the taxes thereon; that after 1883 the defendants in the respective actions, were assessed for taxes, on their respective improvements on the land occupied by them and the taxes so assessed were paid by them; that in the spring of 1889 the plaintiff Lakin after he had acquired a judgment against the Sierra Buttes Gold Mining Company, enforcing a trust in the portion of the patented ground which include the premises in controversy notified the defendant Dolly and the defendants in the Roberts case, that they must either pay rent for the land occupied by them, purchase said land or quit the premises and remove their improvements therefrom within thirty days; that defendants neglected
74 and refused to perform either of said requirements and remained in the possession of the premises.

Upon the foregoing facts the contention of defendants is that, under the provisions of section 2318 and 2320 Rev. St. U. S., the patent issued to the Mammoth Gold Mining Company is void as to all that portion of surface ground on the east or southeast side of the quartz lode in excess of 300 feet from the center of the lode. The contention of the plaintiff is, that the land department had jurisdiction to pass upon all questions of fact and to issue the patent, that its action in this respect is conclusive and cannot be collaterally attacked in an action of ejectment.

I had occasion in Rose v. Richmond M. Company, 17 Nev. 25; 114 U. S. 576, and in the recent case of Whitney v. Taylor, ———Fed. R.———to thoroughly examine the question as to when, where and under what circumstances, a patent could be declared void and to determine the extent of the power of the land department of the Government of the United States to pass upon and decide jurisdictional facts. The question was referred to and discussed by Mr. Justice Sawyer in

Francoeur v. Newhouse 40 Fed. R. 623, and has been frequently raised and passed upon in a great variety of cases in the Supreme Court of the United States.

Polks Lessee v. Wendall, 9 Cranch, 87;
New Orleans v. United States, 10 Pet., 662, 730;
Wilcox v. Jackson, Dem. McConnell, 13 Pet., 498, 509;
Stoddard v. Chambers, 2 How. 284, 317;
Easton v. Salsbury, 21 How. 426, 428;
Reichart v. Felps, 6 Wall, 160;
75 Best v. Polk, 18 Wall, 112, 117;
Eleavenworth Railroad v. United States, 92 U. S., 733;
Newhall v. Sanger, 92 U. S., 761;
Sherman v. Buick, 93 U. S , 209;
Smelting Co. v. Kemp, 104 U. S., 636;
Steele v. Smelting Co., 106 U. S., 447;
Kansas Pacific Railway Co. v. Dunmuir, 113, U. S., 629, 642;
Reynolds v. Iron Silver Mining Co., 116 U. S., 687.

The general principles bearing upon this subject are very clearly announced by Mr. Justice Miller in delivering the opinion of the Court in Doolan v. Carr, 125 U. S. 624 as follows: "There is no question as to the principle that where "the officers of the government have issued a patent in due "form of law, which on its face is sufficient to convey the title "to the land described in it, such patent is to be treated as "valid in actions at law, as distinguished from suits in equity, "subject, however, at all times to the inquiry whether such "officer had the lawful authority to make a conveyance of the "title. But if those officers acted without authority; if the land "which they purported to convey had never been within their "control, or had been withdrawn from that control at the "time they undertook to excercise such authority, then their "act was void—void for want of power in them to act on the "subject matter of the patent, not merely voidable in which "latter case, if the circumstances justified such a decree, a "direct proceeding with proper averments and evidence would "be required to establish that it was avoidable and should "therefore be avoided. The distinction is a manifest one, al-"though the circumstances that enter into it are not always "easily defined. It is nevertheless a clear distinction, estab-
"lished by law, and it has been often asserted in this
76 "Court, that even a patent from the Government of the
"United States, issued with all the forms of law, may be "shown to be void by extrinsic evidence, if it be such evi-

"dence as by its nature is capable of showing a want of au-
"thority for its issue." In the light of the authorities there can be no question as to the duty of this Court to investigate and determine whether or not defendants contention is well founded.

It is claimed by plaintiff that upon the facts of this case, and under the provisions of section 2328 and 5577 Rev. St. U. S., the patent must be considered and treated as having been issued under the Act of Congress of 1866; it is immaterial so far as the result of this decision is concerned whether the patent is construed with reference to the Act of 1866 or the subsequent provision of the Revised Statutes under and in pursuance of which the patent purports to have been issued. But I am of the opinion that the question as to the validity of the patent depends upon the construction to be given to section 2320 Rev. St. U. S. This section reads as follows:—
"Mining claims upon veins or lodes of quartz or other rock
"in place bearing gold, silver, cinnabar, lead, tin, copper, or
"other valuable deposits, heretofore located, shall be governed
"as to length along the vein or lode by the customs, regu-
"lations and laws in force at the date of their location. A
"mining claim located after the 10th day of May 1872,
"whether located by one or more persons, may equal but
"shall not exceed one thousand five hundred feet in length
"along the vein or lode; but no location of a mining claim
"shall be made until the discovery of the vein or lode within
"the limits of the claim located. No claim shall extend
77 "more than three hundred feet on each side of the
"middle of the vein at the surface, nor shall any
"claim be limited by any mining regulation to less than
"twenty-five feet on each side of the middle of the vein at
"the surface, except where adverse rights existing on the
"10th day of May 1872, render such limitation necessary.
"The end lines of each claim shall be parallel to each other."

This entire section seems to be clear, definite and certain. It provides that all mining claims upon quartz lodes located prior to its passage should be governed as to the length of the claim along the lode "by the customs, regulations and "laws in force at the date of their location;" that the claims located after the 10th day of May 1872, "may equal, but shall "not exceed one thousand five hundred feet in length along "the vein or lode." So far the section relates solely to the question of the length of the lode that may be located. It next takes up the question as to how much surface ground

will be allowed to the locator of a quartz lode and says that "no claim" evidently meaning all claims, whether coming within the first clause relating to claims located prior to the passage of this section or within the second clause relating to locations made subsequent thereto—"shall extend more than "three hundred feet on each side of the middle of the vein at "the surface." Having thus expressed the extent of the surface ground to which the locator may be entitled it further provides that the amount of surface ground shall not in any case, be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the
78 surface except in certain contingencies which have no application to the facts of this case. After the passage of the act of which this section forms a part, it seems very clear to my mind, that the land department had no jurisdiction, power or authority to issue a patent for a quartz lode, to any surface ground exceeding three hundred feet in width on each side of the middle of the vein or lode. And that any patent which is issued for more than that amount of surface ground is absolutely null and void as to the excess over three hundred feet and can be collaterally attacked in a Court of law.

The principles announced in Smelting Co. v. Kemp, 104 U. S. 636, in so far as the same are applicable to these cases, fully support the conclusions I have reached. There, as herein, the patent was regular upon its face "unless some "limitation in the law as to the extent of a mining claim "which can be patented, has been disregarded." In the course of an exhaustive and able opinion by Mr. Justice Field, quoting from Patterson v. Winn 11 Wheat. 380, it is said "that if a patent was issued without authority or was prohib-"ited by statute * * * it could be impeached collaterally "in a Court of Law in an action of ejectment."

In explanation of the phrase "that if the patent be abso-"lutely void on its face it may be attacked collaterally, im-"peached in a Court of Law," the learned Justice, delivering the opinion of the Court, said, "It is meant that the patent is "seen to be invalid, either when read in the light of existing "law or by reason of what the Court must take judicial notice "of; as for instance * * * that the patent is for an un-"authorized amount." The contention of the defendant in that case rested upon the correctness of their assertion
79 that a patent could not issue for a placer mining claim, which embraced over one hundred and sixty acres.

This contention was sought to be maintained upon the theory that the applicant for a patent could not embody in his application any mining ground that he had purchased from other locators. The Court held that there was no valid reason, and nothing in the language of the acts of Congress which prevented an individual from acquiring by purchase the mining ground located by others and adding it to his own. The views therein expressed are conclusive as to the right of the applicant for a patent to the Mammoth Quartz lode to embrace in their application two or more separate locations owned by them on the same lode.

In Parleys Park Mining Company vs. Kerr, the question was presented whether the patent issued for a quartz lode was void because it embraced more than two hundred feet in width of surface ground. The question thus raised was substantially the same as presented here, but the facts were different. There it was shown that the rules adopted on the 17th of May by the miners of the district, where the lode was located, provided "that the surface width of any mining loca-
"tion shall not exceed one hundred feet in width on each side
"of the wall rocks of said lode." But it also appeared that in anticipation of the Act of Congress of May 10, 1872, (section 2326 Rev. St.) there was a meeting of miners held in said district on the 4th of May, 1872, and the rules of the district were altered and amended so as to provide that "the surface
"width shall be governed by the laws of the United States of
"America," and the Court very properly held that in view of this testimony the land department had a right to determine which of these rules were in force. What the result of the opinion would have been if there had been no amend-
80 ment to the mining rules is made clear by the language of the Court in its reference to the rules and regulations of the miners adopted in 1870, limiting the surface ground to two hundred feet. Upon this point the Court said, "had
"that regulation remained in existence and been in operation
"at the time the Clara claim was located, its effect upon the
"legality and validity of that location, at least as to all the
"land in excess of two hundred feet, could not be doubted."
(130 U. S. 261.)

In the case under consideration the surface ground upon which the town of Johnsville is situated, embracing the lands claimed by defendants, was never possessed or located as a part of the Mammoth Quartz lode and there was no law of the United States at the time the application was made for a

patent in 1867 or when the patent was issued in 1877, or any State law, or any local rules, regulations or custom of the miners in Jamison Mining District which authorized or permitted any such location to be made. That patent, in so far as it includes any of said ground, was issued without any authority of law and is therefore null and void.

Does the agreed statement of facts establish such a tenancy between the respective parties as to estop the defendants from denying the title of the plaintiff to the lands in controversy? The general rule that a tenant cannot dispute his landlord's title is too well settled to require any discussion or citation of authorities. This rule, however, is subject to various exceptions and qualifications equally as important and well established as the rule itself. Among the exceptions are (1) Where the tenant was induced to take a lease by mistake, fraud or misrepresentation on the part of the lessor; (2) Where both parties acted under a mutual mistake
81 as to the law in regard to the title of the lessor; (3) Where the tenant did not take possession of the property under the lease, but was in the possession at the time he took his lease.

Tewksbury v. Magraff, 33 Cal., 341.
Franklin v. Meridia, 35 Cal., 575.
Schultz v. Elliot, 11 Humph., 187.
Hammons v. McClure, 85 Tenn., 5.
Miller v. McBrier, 1 Serg. & R., 382.
Swift v. Dean, 11 Vt., 323.
Carter v. Marshal, 72 Ill., 609.

(Big. Est. Sec. 399, 409, 527, 2 Tay. Land & Ten. Sec. 707, Woods Land & Ten., 364, 374.)

The principles of law relating to these exceptions are elaborately stated and the reasons given in support thereof are so clearly enunciated in the authorities cited that I deem it unnecessary to discuss this branch of the case at any length. The third ground above stated is the only one upon which there is any dissent. It would probably require, in certain cases, some qualification and depend, to a great extent in all, upon the particular facts of each case. But upon the agreed statement of facts in this case the exceptions mentioned are directly applicable to this case and, in my judgment, conclusive in favor of the right of defendants to show that the plain-

tiff did not acquire any title to the lands in controversy by virtue of the patent for the Mammoth Quartz lode.

It is certainly clear that the parties have acted under a mistake as to the law in regard to the title of plaintiff. Estoppels are said to be odious in law, as they have a tendency to prevent a full, complete and thorough investigation of the truth, and in order to be operative in any case, ought to be certain to every intent, precise, clear and unequivocal, and not
82 depend upon inference.

The facts agreed to fall far short of establishing the complete relation of landlord and tenant, express or implied, so as to have the effect in law to estop the defendants from asserting the truth. At the time of the commencement of these suits the defendants were in possession of the lands occupied by them under the possessory title, originally acquired by Banks, and although they have no title from the Government of the United States, they are in a position to show that they have a better right to the lands than plaintiff.

If the defendants were simply in the posssession as mere naked trespassers, without any question of tenancy being raised, they could in defense of such possession attack the validity of the plaintiff's title, for it has been held by the Supreme Court of the United States that in cases of this character, as in all other cases of ejectment, the plaintiff must recover on the strength of his own title and not upon the weakness of defendants:

Reynolds v. Iron Silver Mining Co., 116 U. S., 688.
Doolan v. Carr, 125 U. S., 688.

The facts agreed upon, with reference to the payment of taxes, are irrelevant and immaterial as they do not establish any title in either party.

In the pursuance of the stipulation and agreement of counsel it follows, from the conclusions reached, as to the law of the case, that in the case of Lakin v. Dolly the judgment heretofore entered in favor of the plaintiff, must be set aside upon the payment by defendant, of the costs of plaintiff's included in said judgment, and judgment be entered in favor of defendant for his costs. And in Lakin v. Roberts et. al.,
83 judgment must be entered in favor of defendants for their costs.

It is so ordered.

HAWLEY, *Judge.*

Endorsed: Opinion read in open Court, March 23, 1891.
L. S. B. Sawyer, Clerk.

(Here follow pages 84 and 85 in the original record containing the petition for writ of error, which is omitted from this printed record pursuant to stipulation.)

Assignment of Errors.

86 (Title of court and cause.)

Plaintiff in error makes the following assignment of errors committed by the Circuit Court in and for the Ninth Circuit, Northern District of California, in the consideration and determination of the action wherein said Wm. H. Lakin is plaintiff and said defendants above named and others are defendants, and which plaintiff in error asks to have received in said Circuit Court of Appeals upon Writ of Error to said Circuit Court.

87 1st. The said Circuit Court erred in rendering judgment in favor of the defendants in error upon the findings and in not rendering judgment in favor of the plaintiff thereupon.

2nd. The Circuit Court erred in overruling the objection of plaintiff to proof of the mining rules of Jamison Mining District and in admitting proof of the same for the purpose of assailing the patent under which plaintiff claimed title. The full substance of the evidence, in regard to said rules, is set out in the Bill of Exceptions in said action, which is hereby referred to and made part of these assignments of errors.

3rd. The Circuit Court erred in overruling the objection of plaintiff to proof of the custom of miners in said District and in admitting said proof for the purpose of assailing the patent under which plaintiff claimed title. The full substance of the evidence, in regard to said custom, is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

4th. The Circuit Court erred in overruling the objection of plaintiff to proof of the possessory claim of John Banks in support of the possession of the defendants. The full substance of the evidence, in regard to said claim, is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

5th. The decision of said Circuit Court is against law in allowing the mining patent under which plaintiff claims title

to be collaterally assailed by the defendants in this action.

88 6th. The decision of said Court is against law in holding that said patent is void as to any of the land occupied by said defendants or as to any part of the premises in said patent described.

7th. The decision of said Court is against law in holding that at the time this action was commenced plaintiff did not own or was not entitled to possession of the land occupied by said defendants.

8th. The decision of said Court is against law in deciding that as to any of said defendants that said action should be dismissed and in awarding judgment to any of them for their costs and disbursements.

9th. That said Circuit Court erred in finding as a fact "That there was not at any time prior to 1868 any law, usage "or custom in force in Jamison Mining District authorizing "the location or occupancy of more than one hundred feet of "surface ground on each side of the lode located," and the said finding is not justified by the statement of facts agreed to by the parties nor by evidence, and is conclusively contradicted by the record of the land office as to the application and proceedings for the patent under which plaintiff claims. The substance of all the evidence pertaining to said finding of fact is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

10th. The said Circuit Court erred in finding as a fact that "no surface ground was claimed along the line of the "said Mammoth lode," and the said finding is not justified by the evidence, which shows that the locators of said Mammoth lode claimed and located a tract of land parallel with

89 said lode, and including Jamison Creek, for working purposes, about the time of the original location of said lode, which claim included said creek and three hundred yards on each side thereof within the limits of the patented premises. The substance of all the evidence relating to the location, possession and working of said claims is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

11th. The Circuit Court erred in finding as a fact that there was no possession of the land in controversy for mining purposes prior to the issuance of the patent under which plaintiff claims title, and the said finding is not justified by the evidence, which shows constructive possession of the whole thereof for said purpose before said patent was applied for.

The substance of all the evidence relating to said possession is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

12th. The Circuit Court erred in finding as a fact that there was a custom in force in Jamison Mining District from 1856 to 1868 to record all notice of mining locations in the office of the County Recorder of Plumas County and there is no evidence to sustain or justify said finding. The said Bill of Exceptions contains all the evidence relating to the rules and customs of miners in said district, and is hereby referred to and made part of this assignment of errors.

90 13th. The Circuit Court erred in finding as a fact that no other notices than those set out in the fifth finding of fact were posted and published in the proceeding to obtain said patent, and said finding is contrary to the evidence in regard to said proceeding, all of which is contained in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

14th. The Circuit Court erred in finding as a fact that McGee and Thompson took no other or further steps to procure a patent than those set out in said findings, and said finding is not justified by the evidence, which shows that they took all steps necessary to forestall any opposition by any claimant to said premises or any part thereof, said evidence is fully set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

15th. The Circuit Court erred in finding as a fact that one John F. Banks on the 17th day of June, 1876, entered upon and located twenty acres of land upon which the town of Johnsville is now situated and said finding is not justified by the evidence, there being no evidence to show that said Banks was ever in possession or has a right of possession of any part of said land, or of any part of the premises in controversy or that he lawfully located the same. All the evidence pertaining to said matters is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

16th. The Circuit Court erred in finding as a fact that the claim of said Banks passed by mesne conveyances to

91 the defendants residing in the town of Johnsville, and said finding is not justified by the evidence, there being no evidence to support it, as shown by said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

17th. The Circuit Court erred in finding that plaintiff, at the time of the commencement of the action, was not the owner of nor entitled to the possession of the land occupied by the defendants, and said finding is not justified by and is contrary to the evidence, which shows that said plaintiff is and was at the time of the commencement of said action the owner of and entitled to the possession of all of said premises and of all the premises described in the complaint of plaintiff therein.

Wherefore plaintiff in error prays that the judgment rendered in said action by said Circuit Court on the 31st day of October, 1891, in favor of said defendants in Error and against this plaintiff, whereby the said action was dismissed as to said defendants and each at the cost of said plaintiff be reversed by said Circuit Court of Appeals and that said Circuit Court of Appeals render judgment upon the record in said action in favor of this plaintiff and against each and all of said defendants, as prayed for in his complaint.

H. L. GEAR,

Attorney for Plaintiff in Error.

Endorsed: Filed December 30, 1891.

L. S. B. Sawyer, Clerk.

(Here follows pages 92 and 93 of the original record, containing bond on Writ of Error, which is omitted from this printed record pursuant to stipulation.)

Certificate of Record.

(Title of court and cause.)

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing ninety-three written and printed pages, numbered from 1 to 93 inclusive, to be a full, true and correct copy of the record and of the proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed Writ of Error.

In testimony whereof, I have hereunto set my hand and

affixed the Seal of said Circuit Court, this 26th day of January, A. D., 1892.

L. S. B. SAWYER,

Clerk U. S. Circuit Court, Northern District of California.

{ SEAL }

Writ of Error.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States, to the Honorable, the Judge of the Circuit Court of the United States for the Northern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between Wm. H. Lakin, plaintiff in error, and J. H. Roberts, W. C. Roberts, M. Kerr and Mrs. Kerr, his wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Bacher, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, H. B. Houghton, J. F. Houghton, John Thomas, James Menzies, George Woodward, Mrs. Anna Jenkins, O. B. Dolly and Mrs. Dolly, his wife. M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol. Babb and Mrs. Babb, his wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robert Penman, L. Cipriotto, Frank Tucker, H. S. Dunn, Wm. Littecott, John Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perin, M. Curtis, E. Stephens, Jack Moni, Henry Doney and L. Grondoni, defendants in error, a manifest error hath happened, to the great damage of the said Wm. H. Lakin, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 29th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that

error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30th day of December, in the year of our Lord, One Thousand Eight Hundred and Ninety-one.

D. MONCKTON,

Clerk of the U. S. Circuit Court of Appeals for Ninth Circuit.

{ SEAL }

Allowed by Hawley, Judge.

Return to Writ

The Answer of the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the Seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this Writ annexed, as within we are commanded.

By the Court:

L. S. B. SAWYER, *Clerk.*

{ SEAL }

Endorsed: Filed December 30, 1891. L. S. B. Sawyer, Clerk U. S. Circuit Court, Ninth Circuit, Northern District of California.

(Here follows citation with admission of service by Goodwin & Goodwin, attorneys for defendants in error and agreement by them to appear, omitted pursuant to stipulation.)

Stipulation as to Printing of Record.

(Title of court and cause.)

It is hereby stipulated between the parties to the above-entitled cause that the printing of the record on behalf of the plaintiff in error need not include the summons or return thereof, the additional findings and judgment for plaintiff against

certain defendants as to which no errors are assigned or the petition for writ of error, citation, or bond, but need only include the pleadings, findings and judgment for defendants in error, the bill of exceptions, the assignment of errors, and the writ of error and return thereof, and the opinion of the Court below, and that there need be no unnecessary repetition of the Court and cause, and that the pleadings may be stated to be duly verified.

H. L. GEAR,
Attorney for Plaintiff in Error.

GOODWIN & GOODWIN,
Attorneys for Defendants in Error.